United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

with affidavit of Service

74-1507

To be argued by
WILLIAM S. BRANDT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1507

OTIS CLAY,

Plaintiff-Appellant,

—against—

DOCTOR WILLIAM R. MARTIN, DOCTOR PETER A. MANSKY, and DOCTOR DONALD R. JASINSKI,

—and—

THE UNITED STATES SURGEON GENERAL,
THE UNITED STATES ATTORNEY GENERAL,
THE DIRECTOR OF THE BUREAU OF PRISONS,

—and—

THE UNITED STATES,

Defendants-Appellees.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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OTIS CLAY,

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—against—

DOCTOR WILLIAM R. MARTIN, DOCTOR PETER A. MANSKY, and DOCTOR DONALD R. JASINSKI,

—and—

THE UNITED STATES SURGEON GENERAL,
THE UNITED STATES ATTORNEY GENERAL,
THE DIRECTOR OF THE BUREAU OF PRISONS,

—and—

THE UNITED STATES,

Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

This is an appeal by the plaintiff Otis Clay from an Order entered by the Clerk of the United States District Court for the Southern District of New York, dated March 14, 1974, dismissing plaintiff's second amended complaint. The Order followed an unreported memorandum decision by Hon. Sylvester J. Ryan, endorsed on March 14, 1974, denying plaintiff's motion for leave to file a third amended complaint and granting defendants' motion to dismiss the second amended complaint.

Issues Presented

1. Did Judge Ryan abuse his discretion in denying Clay's motion to file a third amended complaint and granting the defendants' motion to dismiss the second amended complaint for failure to comply with his order?

2. Were the alternative grounds of the District Court's decision, including lack of subject matter and personal jurisdiction, sufficient for dismissing the complaint?

3. Is 42 U.S.C. § 233(a) a bar to any action by the plaintiff against the three Public Health Service doctors—defendants Martin, Mansky, and Jasinski?

PROCEDURAL HISTORY

Judge Ryan's endorsement was based upon the "file and record"; therefore, it is necessary to examine the record and the file as it was before him at the time of the plaintiff's and defendants' motions.*

A. The Pro Se Complaint

This action was originally commenced by Mr. Clay, *pro se*, by the filing on May 24, 1971 of a complaint dated May 12, 1971 (See Notice of Motion [Complaint 4-a]). The first complaint included the following defendants: Dr. William R. Martin, Dr. Peter A. Mansky and Dr. Donald R. Jasinski (sued therein as Dr. Jenesky), all of whom are Public Health Service doctors, as well as the Surgeon General, the Attorney General, the Bureau of

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* Almost all of these documents are set forth in defendants' appendix.

** References to the Appellees' Appendix (appellant having elected to proceed on the Record below, F.R. App. P. 30(f)) will be indicated by the page number followed by the letter "a".

Prisons and the United States Government. A fair reading of the first complaint reveals that plaintiff was a federal prisoner who, in mid-1968, was transferred from federal detention facilities to the Addiction Research Center, a laboratory of the National Institute of Mental Health in Lexington, Kentucky.

While at that facility, plaintiff alleges that he participated in a number of experimental drug programs. With respect to an experiment conducted in May of 1970, plaintiff alleges that he was presented prior thereto with a pamphlet which stated that the drug had been tested on animals with adverse effects on these animal's hearts and that this was to be the first test on man. Dr. Martin assured plaintiff that there would be no ill effect, as the amounts of the drug to be injected were minute. Plaintiff thereafter agreed to participate in the drug program and received two injections, one week apart. Some time after the second injection plaintiff suffered a heart attack.

The gravamen of plaintiff's first complaint was that Dr. Martin and his staff injected the drug knowing that it would cause a heart attack; he therefore alleged an intentional tort. The Surgeon General, Attorney General and the Bureau of Prisons were allegedly responsible for allowing prisoners to participate in such experiments. There were no allegations against the United States. There was no allegation as to the jurisdictional basis of the action.

The defendants answered the complaint on August 9, 1971 (12-a), characterizing the action as one that arose pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* ("FTCA"), and denying that the drug administered to plaintiff was dangerous or that it contributed in any respect to his heart attack.

On October 27, 1971, the plaintiff filed a document entitled "Rebuttal to and for Memorandum and Opposition of Said Attorney Whitney North Seymour, Jr., for the De-

fendants" (16-a). Plaintiff asserted therein that the cause of action did not arise under the FTCA. Instead, plaintiff alleged that his action arose under the Civil Rights Acts, to wit, 42 U.S.C. §§ 1983, 1985. Plaintiff did not explain in what sense the deliberate injection of a known dangerous drug by the defendant doctors constituted a deprivation of his civil rights, nor did he explain the nexus between the allegedly intentional tort and the acts or omissions of the other named defendants.

There was no prosecution of this case for approximately two years. Then, on August 3, 1973, by his attorney, Community Law Offices, the plaintiff served interrogatories (23-a) which were answered on October 26, 1973 and November 16, 1973 (27-a, 37-a).

B. Judge Ryan's Orders

On November 19, 1973, the action was dismissed by Judge Ryan for lack of the prosecution pursuant to Rule 23 of the General Rules of the Southern District of New York (59-a).

Upon a motion dated November 26, 1973 (60-a), the action was restored to the civil docket by an Order dated December 6, 1973, upon *inter alia*, the following conditions:

> "1. That Carl O. Callender, Esq. file a notice of appearance for plaintiff herein within five (5) days from the date hereof. . . ."
>
> "3. That the complaint as filed herein is stricken with leave to file, within twenty-five (25) days from the date hereof, an amended complaint containing a short, concise statement of plaintiff's claim."

The Court further provided the admonition:

> "6. In the event that the directions of paragraphs . . . 3 are not complied with, an order of dismissal may be submitted . . ." (65-a).

C. The Amended Complaints

The plaintiff did not comply with the order in several respects. First, the plaintiff's counsel failed to file a notice of appearance within the time established by the court (1-a). Second, plaintiff failed to file by December 31, 1973, his amended complaint as directed by the Court (1-a). Plaintiff did serve a "complaint" (or amended complaint) upon the United States Attorney on January 2, 1974 (69-a); that complaint, however, was not accepted by the Court Clerk (*See*, Callender Affirmation, 97-a). A second amended complaint, dated January 3, 1974, was filed on January 3, 1974 (71-a).

Most importantly the second amended complaint failed to comply with Judge Ryan's Order that it be a short, concise statement of plaintiff's claim.

Paragraph 1 of the second amended complaint alleged an action under the FTCA, although it failed to lay the jurisdictional foundation for a claim under that statute. Further, even though it was allegedly an FTCA claim, under which the exclusive remedy is a suit against the United States, 28 U.S.C. § 1346(b), it included the same defendants as did the *pro se* action. The complaint alleged the citizenship of all defendants as being in Kentucky or Washington, D.C., and the amount in controversy as being in excess of $10,000.

Paragraph 3 of the second amended complaint alleged that the defendants Martin, Mansky and Jasinski, while acting under the authority of the defendants Surgeon General Attorney General, Director of the Bureau of Prisons and the United States, conducted a drug experiment. Two constructions of the second amended complaint are possible. Read literally, the second amended complaint, paragraph 4, alleged that the defendants (*i.e.*, Doctors Martin, Mansky and Jasinski, the Surgeon General, the Attorney General and the Director of the Bureau of Prisons and the United

States) injected a drug which caused plaintiff to incur a heart attack. It also alleged that the defendants (*i.e.*, Doctors Martin, Mansky and Jasinski, the Surgeon General, the Attorney General, the Director of the Bureau of Prisons and the United States), told him of the previous ill effects of the drug on animals but that the defendants represented that the administration to him was safe. Paragraph 5 of the second amended complaint further alleged that the drug was negligently and recklessly administered by the defendants (again, we assume by *all* defendants).

On the other hand, it is possible to read the complaint more narrowly as alleging that the three Public Health Service doctors were negligent and reckless and further made misrepresentations. So construed, the complaint totally failed to make any allegations against the Surgeon General, the Attorney General, the Director of the Bureau of Prisons and the United States.

Under either reading, no indication is given as to how or why the administration of the drug was reckless or negligent or what course of conduct was allegedly negligent. In fact, it is unclear as to whether plaintiff is complaining of the bare fact that he was injected or whether he is complaining of what was contained in the injection. The defendants are forced to guess whether the plaintiff is referring to the methods of the injection, the circumstances under which it was administered or to some other form of negligence. Plaintiff compounds the confusion even further by alleging that the defendants obtained the plaintiff's consent by misrepresenting what is alleged to be the drug's dangerous quality. Was this an intentional or negligent misrepresentation? Is it the plaintiff's contention that the defendants knew that the drug was dangerous at the time they commenced the experiment, and yet with due deliberation misrepresented the quality of the drug solely to obtain plaintiff's consent? Or, is it plaintiff's position that it was negligent to have made the representation as to the pro-

pensities of the drug? It is unclear as to whether a separate cause of action is being stated for misrepresentation. Even assuming that the plaintiff relied on whatever representation was made (a necessary element in an action for misrepresentation), the language used by plaintiff in the second amended complaint fails to give any notice as to whether the claim is that the defendants knew of any effects of the drug more serious than those of which the plaintiff was allegedly informed or that the defendants for some reason should have known that the administration to the plaintiff would not be safe.

In spite of the obvious shortcomings in the second amended complaint, on January 23, 1974, the defendants attempted to answer and cover all contingencies by raising ten affirmative defenses including a denial that the minute quantity of the drug injected had any connection whatsoever with plaintiff's heart attack (73-a).

Thereafter, by a motion dated February 6, 1974 (81-a), the plaintiff moved for leave to file another amended complaint. The defendants opposed that motion and cross-moved to dismiss the action for failure to comply with Judge Ryan's December 6, 1973 Order (91-a). The defendants opposed the filing of a proposed third amended complaint because it did not clarify, *inter alia*, the inherent confusion within the complaint (93-a).

Judge Ryan, upon the file and record, dismissed the action in an endorsement as follows:

> "This action was commenced by the filing of a Pro Se complaint on May 24, 1971; defendants answered this complaint on August 9, 1971. Thereafter, plaintiff did nothing to prosecute the action until August 14, 1973 when, through his attorney, he served interrogatories, which defendants thereafter answered.

This action was dismissed for lack of prosecution on November 26, 1973. The order of dismissal was later vacated 'with leave to the plaintiff to file, within twenty-five days . . . an amended complaint containing a short, concise statement of plaintiff's claim.' Although plaintiff filed what he calls an amended complaint on January 4, 1974, it differs in no respect with the prior complaints of plaintiff. All of plaintiff's complaints are defective as to venue, subject matter, jurisdiction and improper parties as defendants. These objections were set forth and pleaded in the ten affirmative defenses which were filed as an answer to plaintiff's new complaint herein on January 23, 1974.

The plaintiff again moves for leave to file a further amended complaint, and this motion is opposed by the United States Attorney representing the named defendants, and the United States Attorney also moves to again dismiss the action.

Upon the file and record, the plaintiff's motion to serve a further amended complaint is denied and defendants' motion to dismiss is granted. The complaint is dismissed upon the merits and the clerk is directed to enter such judgment promptly without further order.

So ordered" (102-a).

ARGUMENT

POINT I

The Second Amended Complaint Violated Judge Ryan's Order Because, Like Its Predecessors, It Failed to Contain a Short, Plain Statement of Plaintiff's Claim.

Judge Ryan's original dismissal of this action for lack of prosecution was not an abuse of discretion and is certainly within the inherent powers of a District Court Judge. Fed. Rules Civ. Proc., 41(b); General Rule 23, Southern District of New York; *Link* v. *Wabash R.R.Co.*, 370 U.S. 626 (1966); *West* v. *Gilbert*, 361 F.2d 314 (2d Cir.), *cert. denied*, 385 U.S. 919 (1966). Thereafter, Judge Ryan could properly and did impose reasonable conditions upon the reinstatement of the action to the docket. *See Himalayan Ind.* v. *Gibson Mfg. Co.*, 434 F.2d 403 (9th Cir. 1970); 3 Moore's Federal § 15.08[6], p. 935 (1974). It is submitted that the conditional reinstatement upon the terms set forth in his order was fully justified in this case, where it is obvious that the *pro se* complaint was defective in that it failed to state any jurisdictional basis and pleaded an intentional tort which was barred under 28 U.S.C. § 2680 (h). Further, the action against the Bureau of Prisons, the Attorney General and the Surgeon General could not be maintained under the FTCA or even by analogy under 42 U.S.C. § 1983. *Johnson* v. *Glick*, 481 F.2d 1028, 1033-1034 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973); *Palermo* v. *Rockefeller*, 323 F. Supp. 478, 483 (S.D.N.Y. 1971).*

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* While these are state cases, there exists a right of action under federal common law principles against federal officials for violations of federal constitutional rights, *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). On remand of that case, the Second Circuit noted that the cause of action was "roughly analogous to the right of action against state officers" under the Civil Rights Act. 456 F.2d 1339, 1346 (2d Cir. 1972).

Even if plaintiff complied with Judge Ryan's Order in form, he did not do so in substance. The original complaint, the first amended complaint, the second amended complaint and the proposed third amended complaint were all in reality the same. This in effect amounted to non-compliance with the District Court's order, a fact which Judge Ryan recognized: "Although plaintiff filed what he calls an amended complaint . . . it differs in no respect with the prior complaints of plaintiff" (102-a).

Surely a pleading by an attorney should be held to a higher standard than that of the *pro se* complaint. *Cf. Haines* v. *Kerner*, 404 U.S. 519 (1972). Yet, the second and the proposed third amended complaints were even more confusing than plaintiff's *pro se* complaint. Whereas the *pro se* complaint alleged that the Surgeon General, the Attorney General and the Bureau of Prisons, committed a wrong by permitting experimentation on prisoners, the second amended and proposed third amended complaint alleged negligence and misrepresentation as against all defendants, an allegation which if applied to any defendants other than the Public Health Service doctors is absurd. Alternatively, if the allegations were made only against the doctors, then no allegations were made against the other defendants. As will be seen shortly, the confusion, inconsistency and impropriety of bringing suit against all the named defendants under the FTCA was ample justification for Judge Ryan's dismissal. It was not an abuse of discretion for the Court to dismiss the complaint after plaintiff had several chances to plead and the action had been dismissed. *See O'Brien* v. *Sinatra*, 315 F.2d 637 (9th Cir. 1963); *Martin* v. *Hunt*, 29 F.R.D. 14 (D. Mass. 1961). In reality, Judge Ryan dismissed the complaint for failure to comply with his Order and the action was properly dismissed pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. *See Prezzi* v. *Schelter*, 469 F.2d 691 (2d Cir. 1972), *cert. denied*, 411 U.S. 935 (1973); *Hines* v. *Seaboard Air Line R. Co.*, 341 F.2d 229 (2d Cir. 1965); *Cucurillo* v.

Shulte, etc., 324 F.2d 234 (2d Cir. 1963); *Erie-Lackawanna R. Co.* v. *United States*, 279 F. Supp. 316, 326 (S.D.N.Y. 1967), *modified on other grounds*, 389 U.S. 486 (1968); *Ferro* v. *Railway Express Agency Inc.*, 27 F.R.D. 487 (S.D.N.Y.) *aff'd on point and reversed on other grounds*, 296 F.2d 847, 850 (2d Cir. 1961); *Martin* v. *Hunt*, 29 F.R.D. 14 (D. Mass. 1961); *cf. Hyler* v. *Reynolds Metal Co.*, 434 F.2d 1064 (5th Cir. 1970), *cert. denied*, 403 U.S. 912 (1971).

The mere fact that the second amended complaint was short, does not in anyway make it comprehensible, in fact, the *pro se* complaint was more enlightening than the second amended complaint. *See Prezzi, supra; Franklin* v. *Zuber*, 56 F.R.D. 601 (S.D.N.Y. 1972). Judge Ryan properly determined, and was in the best position to determine, that the effort made to comply with his order was insufficient.

Additionally, for reasons similar to those above, it was not an abuse of discretion for the Court to deny leave to amend the second amended complaint where the action was pending for almost three years, the action had been previously dismissed and several defective complaints had been filed. *See Dostert* v. *Crowley*, 394 F.2d 178 (4th Cir. 1968); *Kamsler* v. *H.A. Seinscheimer Co.*, 347 F.2d 740 (7th Cir.), *cert. denied*, 382 U.S. 837 (1965); *Shall* v. *Henry*, 211 F.2d 226, 231 (7th Cir. 1954); *Washburn* v. *Madison Square Garden Corp.*, 340 F. Supp. 504, 509 (S.D.N.Y. 1972). Further, it was not an abuse of discretion to deny leave to amend where, as here, the proposed amended complaint was insufficient and subject to dismissal. *See Friedman* v. *Chesapeake & Ohio Ry Co.*, 261 F. Supp. 728, 733-34 (S.D. N.Y. 1966), *aff'd*, 395 F.2d 663 (2d Cir. 1968); *Johnson* v. *Partrederiet Brovigtank*, 202 F. Supp. 859, 867 (S.D.N.Y. 1962).

POINT II

The Second Amended Compiaint Fails to State a Cognizable Claim With Respect to the Surgeon General, the Attorney General and the Director of the Bureau of Prisons or Against the United States, Unless Construed Solely as a Claim Under the FTCA; and the District Court Lacked Personal and Subject Matter Jurisdiction in Regard to the Defendant Doctors and the Claims Against Them.

As previously alluded to, the second amended complaint is subject to numerous interpretations. It is necessary to analyze those numerous possibilities in order to understand the propriety of Judge Ryan's order.

A. Against Whom Are the Allegations Made?

1. Are the Allegations of Negligence, Recklessness and Misrepresentation Made Against All Defendants?

A literal reading of the complaint reveals that the allegations in paragraphs 4 and 5 of the second amended complaint are made against the "defendants". Defendants can fairly be read to include the three Public Health Service doctors, *i.e.*, Dr. Martin, Dr. Mansky, Dr. Jasinski, the Surgeon General, the Attorney General and the Director of the Bureau of Prisons. Under that reading, all of these defendants negligently and recklessly administered the drug, all the defendants made misrepresentations as to the qualities of the drug. It is inconceivable that the Attorney General, the Surgeon General and the Director of the Bureau of Prisons touched or spoke with plaintiff. However, if the allegations are made against all the defendants, it is clear that the complaint is absurd and was properly dismissed.

There are indications that plaintiff did not intend to allege any active negligence against the Surgeon General, the Attorney General and the Director of the Bureau of Prisons. A review of plaintiff's proposed third amended complaint reveals that the action is now brought against the *present* Attorney General and the *present* Acting Surgeon General. Substitution of named party-defendants as was done herein, without leave of court is permissible under Rule 25(d), Fed. R. Civ. Proc., only if the suit is prosecuted against them in their official capacity; moreover, the procedure is more suitable to equitable than legal actions. Consequently, the Surgeon General, the Attorney General and the Director of the Bureau of Prisons are doubtful defendants at best.

2. Are the Allegations of Negligence, Recklessness and Misrepresentation Made Against the Three Public Health Service Doctors?

A more logical reading of the complaint is that the defendants who were allegedly negligent and reckless and made misrepresentations were the three Public Health Service doctors, *i.e.*, Doctors Martin, Mansky and Jasinski. Assuming this to be true, the complaint is totally devoid of any allegations against the Surgeon General, the Attorney General and the Director of the Bureau of Prisons, other than the bare averment that the drug experiment was conducted under their authority. A bare averment does not state a claim for relief. *Franklin* v. *Zuber,* 56 F.R.D. 601 (S.D.N.Y. 1972); *see Karlinsky* v. *New York Racing Association, Inc.,* 52 F.R.D. 40, 47-48 (S.D.N.Y. 1971). As Judge Gurfein stated under similar circumstances:

> "While we recognize that in the modern federal practice a complaint which supports a claim for relief on any theory should be sustained . . ., we cannot validate complaints against public officials which literally say nothing except by way of conclusion." *Franklin* v. *Zuber,* 56 F.R.D. 601, 603 (S.D.N.Y. 1972).

If the acts complained of were performed by the Public Health Service doctors, the only cause of action is against the United States under the FTCA. 28 U.S.C. §§ 1346(b), 2674. *Bates* v. *Carlow*, 430 F.2d 1331 (10th Cir. 1970). Any action against the doctors individually for negligence would be barred by 42 U.S.C. § 233.*

B. Is There Any Conceivable Cause of Action Against the Surgeon General the Attorney General and the Director of the Bureau of Prisons?

1. No Vicarious Liability

Plaintiff alleges that the Surgeon General, the Attorney General and the Director of the Bureau of Prisons are vicariously liable for the alleged negligent acts of the Public Health Service doctors. Appellant's Brief, p. 9. However, the law is clear that a "public officer is not vicariously liable for the acts of his subordinate even though the subordinate may be liable." *Tucker* v. *Duke*, 276 F.2d 499 (D.C. Cir. 1960) (Bazelon, J., concurring); *Green* v. *Laird*, 357 Supp. 227, 230 (N.D. Ill. 1973); *see Estate of Burks* v. *Ross*, 438 F.2d 230 (6th Cir. 1971); *cf. Blitz* v. *Boog*, 328 F.2d 596 (2d Cir.), *cert. denied*, 379 U.S. 855 (1964); *David* v. *Cohen*, 407 F.2d 1268 (D.C. Cir. 1969). Therefore the Attorney General, the Surgeon General and the Director of the Bureau of Prisons cannot be liable in tort on the theory that their subordinates, *i.e.*, the Public Health Service doctors were negligent.

Furthermore, the Surgeon General, the Attorney General and the Director of the Bureau of Prisons are not the employer of the Public Health Service doctors; the United States is the employer. Only the Untied States can be held liable for any alleged negligence under the principle of vicarious liability or respondent superior. *Estate of Burks* v. *Ross*, 438 F.2d 230, 235 (6th Cir. 1971).

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* The applicability of 42 U.S.C. § 233 to the Public Health Service doctors is discussed *infra* at Point III.

2. Breach of Statute Does Not Create Liability

Plaintiff alleges on appeal for the first time that there was a breach of statutory duty owed to the plaintiff by the Surgeon General, Attorney General and the Director of the Bureau of Prisons. Plaintiff does not allege how that duty was breached other than by mere conclusory language. Appellant's Brief, pp. 6-8.

There is no individual liability for breach of the statutory duty alleged herein. It has been expressly held that although 18 U.S.C. § 4042 establishes that the Department of Justice and the Bureau of Prisons shall provide for the safekeeping, subsistence and protection of federal prisoners, that statute does not create a private cause of action in favor of a prisoner who is damaged by its breach. *Williams* v. *United States*, 405 F.2d 951, 954 (9th Cir. 1969); *Johnson* v. *Lark*, 365 F. Supp. 289 (E.D. Mo. 1973); *Brown* v. *United States*, 342 F. Supp. 987 (E.D. Ark. 1972), *modified on other grounds*, 486 F.2d 289 (8th Cir. 1972). The sole remedy is against the United States under the FTCA. *Williams, supra* at 954.

3. Failure to Supervise Does Not Create Liability

Further, the Surgeon General, the Attorney General and the Director of the Bureau of Prisons cannot be held individually liable for their lack of supervision assuming that is the nature of the wrong alleged. If the cause of action against the Surgeon General, the Attorney General and the Director of the Bureau of Prisons is based upon a breach of a statutory duty, somehow relating to the lack of supervision over the allegedly wrongful acts performed by the Public Health Service doctors, then it surely fails to state a cause of action. Any action against the Surgeon General, the Attorney General and the Director of the Bureau of Prisons is barred under the doctrine of official immunity.

Estate of Burks v. *Ross*, 438 F.2d 230 (6th Cir. 1971); *see Barr* v. *Matteo*, 360 U.S. 564 (1959); *David* v. *Cohen*, 407 F.2d 1268 (D.C. Cir. 1969); *cf. Blitz* v. *Boog*, 328 F.2d 596 (2d Cir.), *cert. denied*, 379 U.S. 855 (1964).

C. Is There a Cause of Action Against the United States Under the FTCA?

1. The Action Against the Surgeon General, the Attorney General and the Director of the Bureau of Prisons is an action Against the United States

This action, which names individually the Surgeon General, the Attorney General and the Director of the Bureau of Prisons, which does not allege that any of these defendants acted outside the scope of their office, which does not allege any acts of negligence against them, is in reality a suit against their respective agencies through the individual in their official capacities. This fact is amply demonstrated by the fact that in his proposed third amended complaint (88-a), plaintiff names the *current* Attorney General and Surgeon General. Therefore, the suit is cognizable *only* under the FTCA. 28 U.S.C. § 2679(a); *cf. Holmes* v. *Eddy*, 341 F.2d 477 (4th Cir.), *cert. denied*, 382 U.S. 892 (1965); *Schein* v. *United States*, 352 F. Supp. 182 (E.D.N.Y. 1972); *Mullins* v. *First National Exchange Bank of Virginia*, 275 F. Supp. 712 (W.D. Va. 1967); *Meyer Mfg. Co.* v. *Foley*, 234 F. Supp. 732 (S.D. Iowa 1964).

2. There Is No Cause of Action Against the United States Under the FTCA Arising from the Acts of the Surgeon General, the Attorney General and the Director of the Bureau of Prisons

Assuming that the allegations against the Surgeon General, the Attorney General and the Director of the Bureau of Prisons arise through a breach of a statutory duty by the Public Health Service doctors to the plaintiff, no cause of action under the FTCA is stated. Under the FTCA, a suit which charges the Surgeon General, the Attorney General, and the Director of the Bureau of Prisons with failure to properly provide for a prisoner's general welfare is barred by the discretionary function exception of the FTCA. 28 U.S.C. § 2680(a); *see Boulware* v. *Parker*, 457 F.2d 450 (3d Cir. 1972). Likewise, any FTCA cause of action based upon the superiors' failure to properly supervise the doctors at the Research Center is directed to a function equally discretionary and thus is also barred. 28 U.S.C. § 2680(a); *United States* v. *Muniz*, 374 U.S. 150, 163 (1963); *Morton* v. *United States*, 228 F.2d 431 (D.C. Cir. 1955).

3. Were the Defendants Acting Within the Scope of their Employment?

Plaintiff's second amended complaint states that the action arises under the FTCA. A fundamental requirement under the FTCA is that the defendants were acting within the scope of their employment. 28 U.S.C. § 1346(b). Yet, nowhere in any of plaintiff's complaints does he allege that the defendants were acting within or without the scope of their employment. In fact, plaintiff now takes the position that he doesn't have any idea as to whether the defendants were acting within the scope of their employment. Appellant's Brief p. 17. It is one thing to plead alternate or

hypothetical causes of action (Rule 8(e), Fed. R. Civ. Proc.), it is another thing to take no position at all as to an essential for subject matter jurisdiction under the FTCA. *Cf. Gamage* v. *Peal,* 217 F. Supp. 384 (N.D. Calif. 1962).

If plaintiff's position is that the Public Health Service doctors *were* acting within the scope of their employment. then based upon an allegation of negligence against the Public Health Service doctors a cause of action might be stated if the Public Health Service doctors were not performing discretionary functions which would bar the suit under 28 U.S.C. § 2680(a). *Cf. Estate of Burks* v. *Ross, supra; Blitz* v. *Boog, supra.* However, by taking the position that the defendants were within the scope of their employment, only the United States would be a proper party, because under the FTCA the United States is the only party subject to suit. It is claimed that the plaintiff can sue individually the alleged tort feasors as well as the United States. *Contra, Bates* v. *Carlow,* 430 F.2d 1331 (10th Cir. 1970). However, 42 U.S.C. § 233 provides for the immunity of the Public Health Service doctors individually and official immunity bars any suit against the Surgeon General, the Attorney General and the Director of the Bureau of Prisons individually.

If the Public Health Service doctors were acting outside the scope of their office, then the United States is not properly a defendant because the waiver of sovereign immunity for negligence extends only to actions performed by Government employees within the scope of their employment. 28 U.S.C. § 1346(b). No claim for relief would be stated against the Surgeon General, the Attorney General and the Director of the Bureau of Prisons for the reasons set forth in Points IIA1 through IIB3, *supra.*

If, as plaintiff has suggested for the first time on appeal, the Public Health Service doctors may have been acting outside the scope of their employment, then the claims

against those defendants fail for an alternative reason. The doctors having been sued in their individual capacity, the United States would not be a proper party defendant and the District Court would lack *in personam* jurisdiction over the doctors, who are alleged to be residents of Kentucky and Massachusetts and who were not served with process within New York State (1-a). Rule 4(f), Fed. R. Civ. Proc. The failure of the defendants to assert this affirmative defense at any earlier stage of this litigation is irrelevant where, as here, the action has been maintained until the present as an FTCA suit in which the presence of the United States as a proper party-defendant in this district (and as the indemnifier of such individual defendants as may be held liable) would render meaningless the misjoinder of several other improper party defendants beyond the jurisdiction of the District Court. Moreover, if this Court were to reverse the District Court and grant the plaintiff the right to file his third amended complaint by supplying this new "saving construction" of plaintiff's claim, the defendants would thereafter include the affirmative defense of lack of *in personam* jurisdiction over the doctors in their answer thereto, a defense which certainly has not been waived with respect to the proposed third amended complaint. Since the absence of *in personam* jurisdiction over the doctors, sued in their individual capacity, is an issue which may conceivably arise in the proceedings and since it will defeat Clay's claim against those defendants in this litigation,* this

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* This is not to say that Clay is without remedy in the event that he seriously contends that the alleged negligence and alleged misrepresentations were attributable to Public Health Service doctors acting beyond the terms of their compact as federal employees. Clay could, of course, commence suits in state courts in Massachusetts or Kentucky, or in federal courts therein, alleging diversity of citizenship pursuant to 28 U.S.C. § 1332 as a jurisdictional basis, subject to whatever state statutes of limitation apply to Clay's newly characterized personal injury action.

Court should—in the interests of fairness and judicial economy—hold alternatively that Clay's suit against the doctors must fail if he insists that it be construed as an action against them in their individual capacities.

4. There Is No Cause of Action Under the FTCA for Misrepresentation

Plaintiff's second amended complaint alleges that the defendants obtained the consent of the plaintiff for the administration of the drug through misrepresentation of its dangerous quality. Nothing more is stated as to what misrepresentation has to do with this case. Is misrepresentation the basis for a separate cause of action in addition to the one for negligence? Is this intentional or negligent misrepresentation? Even in his brief on appeal, plaintiff does little to clarify the issue of misrepresentation as he states: "However, the misrepresentation does not concern the underlying cause of action which is based on negligence and malpractice." Appellant's brief, p. 19. Thus, the most that can be said is that the allegation of misrepresentation is a reply to the Government's affirmative defense of consent.

In any case, the alleged misrepresentation standing alone, involving the quality of the drug administered and alleging nothing more, fails to state a cause of action. *Cf. De Lange* v. *United States,* 372 F.2d 134 (9th Cir. 1967); *Kilduff* v. *United States,* 248 F. Supp. 310, 313-14 (E.D. Va. 1969).

5. Is Plaintiff Alleging an Intentional Tort?

There is a possibility that plaintiff is alleging an intentional tort of misrepresentation against the various defendants. Plaintiff alleges that "plaintiff was informed by the defendants that administrations of the drug Naltrexone (EN 1693A) [sic] had caused heart conditions in previous experiments with animals, but that the particular administrations to the plaintiff were safe." Thereafter is it alleged

that the drug was injected. Second Amended Complaint ¶¶ 4, 5 (72-a).

There is an implication that plaintiff is alleging that although the defendants knew the drug caused "heart conditions" in animals (and would therefore cause heart conditions in man) they nevertheless injected the drug into the plaintiff. In other words, the misrepresentation of the quality of the drug was intentional; the defendants *knew* it was dangerous yet represented that it was safe.

If the complaint, fairly read, alleges on intentional misrepresentation by the Public Health Service doctors, then any action against the United States is clearly barred. 28 U.S.C. § 2680(h).* The only cause of action would be against the doctors individually. For the reasons discussed *supra*, the lack of personal jurisdiction would bar the suit as against them. If so construed, the entire complaint was properly dismissed.

Thus, it is clear that Judge Ryan was correct in concluding that plaintiff failed to comply with his previous Order of December 6, 1973. Clearly there were improper parties as defendants, clearly there was lack of subject matter jurisdiction as to the claims against some defendants, clearly there was a lack of personal jurisdiction as to the claims against others. Moreover, the complaint failed to

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* The only intentional tort plaintiff has allegedly suffered is "misrepresentation"; consequently, the exception to the § 2680 (h) bar against intentional tort suits, contained in 42 U.S.C. § 233(e), has no application here. Furthermore, since plaintiff contends that § 233 in its entirety is inapplicable to him and further insists that his action is for negligence if not misrepresentation, this Court should not revive his action under the wholly novel theory of a battery. But if this Court should construe the action as one for battery, it would fail for the independent reason that plaintiff gave his written consent to the Public Health Service doctors prior to the administration of the drug (78-a).

state a claim upon which relief could be granted against many of the defendants as it made no allegations against them whatsoever. None of the complaints were in any sense a short, concise statement of plaintiff's claim. Under these circumstances Judge Ryan did not abuse his discretion in dismissing the complaint.

POINT III

Section 233 of 42 U.S.C. Provides Immunity for the Public Health Service Doctors.

Plaintiff suggests that 42 U.S.C. § 233 should be construed narrowly so as not to bar his suit against the Public Health Service doctors in their individual capacity. Plaintiff further states that policy reasons concerning "waiver of governmental immunity embodied in the Federal Tort Claims Act are to be construed narrowly." Appellant's Brief, p. 12.

Section 233 of 42 U.S.C. is in no way an exception to the FTCA. In fact, that section is a recognition of liability by the United States for negligent acts of Public Health Service doctors acting within the scope of their employment.

Plaintiff's argument that the statute should be construed narrowly is equally unpersuasive. First, plaintiff fails to suggest any construction of the statute which would not make it applicable herein. Second, from its very words it is clear that the Congress intended it to apply to civil actions such as this.

Section 233(a) provides in relevant part:

> "The remedy against the United States provided by sections 1346(b) and 2672 of Title 28 . . . for damages for personal injury . . . resulting from the performance of medical, surgical, dental or related

> functions including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, *shall be exclusive of any other civil action* or proceeding by reason of the same subject-matter against the officer or employee . . . whose act or omission gave rise to the claim." (emphasis added).

Clay instituted his civil action on May 24, 1971, five months *after* the effective date of the above-quoted amendment to the Public Health Service Act, 42 U.S.C. § 201 *et seq.* Plaintiff alleges that he suffered his heart attack in May 1970.

A statute speaks from the date of the enactment. U.S. Const. Art. I, § 7; 2 Sutherland, *Statutory Construction,* § 33.06 (4th ed. 1973). This statute therefore applies to all civil action which were commenced after December 31, 1970. Thus the statute bars this suit against the Public Health Service doctors for acts taken within the scope of their employment.

If Congress intended a delayed effective date of the statute's operation, it certainly knew how to provide for it. In two similar statutes (relating to federal employees operating motor vehicles and to Veterans Administration officials) providing for exclusive Federal liability combined with immunity provisions Congress provided:

> "The remedy against the United States . . . shall *hereafter* be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee. . . ." 28 U.S.C. § 2679(b), Public Law 87-256 (emphasis added).

and

> "The remedy against United States . . shall *hereafter* be exclusive of any other civil action or proceed-

> ing by reason of the same subject matter against [the employee of the Veterans Administration]." 38 U.S.C. 4116, Public Law 89-311 § 6(a) (emphasis added).

The use of the "hereafter" in both of these statutes is significant and demonstrates that in those statutes the Congress intended them to be prospective in application. In both those statutes the word "hereafter" was defined through delayed effective date provisions. Thus, the Federal Drivers Act, 28 U.S.C. § 2679(b), Public Law 87-256 § 2 provided:

> "The amendments made by this Act shall be deemed to be in effect six months after the enactment hereof but any rights or liabilities then existing shall not be affected."

In enacting the immunity provisions for Veterans Administration personnel Congress provided in Section 6(c) of Public Law 89-311:

> "The amendments made by this section shall take effect on the first day of the first calendar month which begins more than one hundred and eighty days after the date of enactment of this Act, but, in the case of an act or omission which occurred before such effective date, such amendments shall apply only if no suit or civil action has been commenced before such effective date with respect to such act or omission."

In contrast, 42 U.S.C. § 233, Public Law 91-623, carries no such specific language delaying in any way the effective date of its provisions, nor indicating that its subject matter is anything other than "any civil action or proceeding brought in any court" against Public Health Service employees acting within the scope of their employment regardless of the date on which the cause of action accrued. *Cf. Pan American World Airways, Inc.* v. *C.A.B.*, 380 F.2d 770,

781 (2d Cir. 1967), *aff'd*, 391 U.S. 461 (1968), *rehearing denied*, 393 U.S. 957 (1968).

The Constitution does not bar the elimination of the common law cause of action against possibly judgment-proof Public Health Service doctors, particularly where Congress has furnished injured plaintiffs with a remedy, albeit an exclusive one, against the United States under the F.T.C.A. *See Silver* v. *Silver*, 280 U.S. 117 (1929); *Nistendirk* v. *McGee*, 225 F. Supp. 881 (W.D. Mo. 1963).

So long as the plaintiff can bring suit against the United States for the alleged negligent acts of the Public Health Service doctors, he has not suffered any unconstitutional deprivation.

CONCLUSION

Judge Ryan's order dated March 14, 1974, should be affirmed on the ground that plaintiff failed to comply with the Court's previous order of November 26, 1973.

Alternatively, this Court should:

(1) Dismiss the second amended complaint against the Surgeon General, the Attorney General and the Director of the Bureau of Prisons because the complaint fails to state a claim upon which relief can be granted against those defendants, and the district court properly determined that it lacked subject matter jurisdiction regardless of how the complaint is construed; and

(2)(a) construe the second amended complaint as one for intentional misrepresentation, dismiss the action against the United States as being barred by 28 U.S.C. § 2680(h) and dismiss the complaint against the Public Health Service doctors for lack of jurisdiction over the person, or

(b) construe the complaint as one for negligence, permit the action to proceed under the FTCA against the United States and dismiss all claims against all remaining defendants.

Dated: September 16, 1974

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the
Southern District of New York,
Attorney for Defendants-Appellees.

WILLIAM S. BRANDT,
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Of Counsel.

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Form 280 A-Affidavit of Service by Mail
Rev. ^/72

CA 74-1507

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 16th day of September 19 74 she served two copies and one copy of appendix of the within

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by placing the same in a properly postpaid franked envelope addressed:

Carl O. Callender, Esq.,
176 East 106th St.
NY NY 10029

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline Troia

Sworn to before me this

16th day of September 19 74

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975

74-1507

TO BE ARGUED BY
CARL O. CALLENDER, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OTIS CLAY,	:	
- against -	:	
DOCTOR WILLIAM R. MARTIN, DOCTOR PETER A. MANSKY, and DOCTOR DONALD R. JASINSKI,	:	
- and -	:	Docket Number 74-1507
THE UNITED STATES SURGEON GENERAL, THE UNITED STATES ATTORNEY GENERAL, THE DIRECTOR OF THE BUREAU OF PRISONS,	:	
- and -	:	
THE UNITED STATES,	:	
Defendants-Appellees.	:	

APPELLANT'S REPLY BRIEF IN OPPOSITION TO THE COURT ORDER DISMISSING THE INSTANT CAUSE OF ACTION ON THE MERITS

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Arthur Helton

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I

WHETHER THE DISTRICT COURT SHOULD HAVE GRANTED THE PLAINTIFF'S APPLICATION FOR LEAVE TO FILE AN AMENDED COMPLAINT?

A

WHETHER THE PLAINTIFF'S PROPOSED AMENDED COMPLAINT IS A SHORT, PLAIN STATEMENT OF THE CLAIM SHOWING THAT THE PLAINTIFF IS ENTITLED TO RELIEF?

II

WHETHER MEDICAL EXPERIMENTATION UPON FEDERAL PRISONERS SHOULD BE SUBJECT TO JUDICIAL REVIEW?

STATEMENT OF THE CASE

See plaintiff-appellant's brief at ii and defendants-appellees' brief at 2 for the statement of the case.

ARGUMENT

Point I

WHETHER THE DISTRICT COURT SHOULD HAVE GRANTED THE PLAINTIFF'S APPLICATION FOR LEAVE TO FILE AN AMENDED COMPLAINT?

The context of this appeal is the application to the district court on February 6, 1974 by the plaintiff for leave to file an amended complaint. Appendix at 81-90. The plaintiff served and filed the amended complaint dated January 3, 1974 pursuant to the order of the district court dated December 6, 1973. Appendix at 66 and 71. The defendants answered this amended complaint with particularity on January 23, 1974 raising ten affirmative defenses. Appendix at 73-78. On February 1, 1974 the plaintiff sought the consent of the attorney for the defendants to further amend the amended complaint in response to three of the affirmative defenses raised. Appendix at 87 and 100. The attorney for the defendants refused to consent to any amendments unless the plaintiff agreed to drop all of the defendants from the action except the United States. Appendix at 87.

The plaintiff applied to the district court for leave to file an amended complaint and the defendants opposed the application and moved to dismiss the action. Appendix at 91-96. In their opposition to the plaintiff's application the defendants admit that the plaintiff's proposed amendments

cannot cause them undue prejudice. Appendix at 95.[1]

Leave to amend should be given freely by the courts when justice so requires. Fed. R. Civ. P. 15(a); Foman v. Davis, 371 U.S. 178 (1962); 3 J. Moore Federal Practice ¶ 15.08 at 874 (2 ed. 1974). The mandate of Rule 15(a) as enunciated by the Supreme Court is to resolve issues on the merits rather than on the basis of pleading technicalities. Foman at 181 and 182. Where the moving party is not guilty of bad faith or undue delay, and where the opposing party will not be unduly prejudiced, the courts have allowed amendments freely in the recognition that the mandate of Rule 15(a) is that controversies shall be decided on the merits.

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[1] The plaintiff served and filed his application for leave to amend by notice of motion with the return date of February 18, 1974. The clerk of the district court stamped the filing date of March 14, 1974 on the plaintiff's motion.

This was seven days after the return date of March 7, 1974 specified in the defendants' papers in opposition and the motion to dismiss. The court clerk stamped the filing date of February 25, 1974 on the defendants' papers. Appendix at 3.

This discrepancy is puzzling given the procedural expedition required of the court clerk and judges in such matters by Rules 5(e) and 79 of the Federal Rules of Civil Procedure. It is conceivable that some clerical mishandling may have prevented the district court from fully entertaining the plaintiff's motion to amend.

United States v. Heyward-Robinson Co., Inc., 430 F.2d 1077 (2d Cir. 1970), cert. den. 400 U.S. 1021 (1971); Green v. Wolf Corp., 50 F.R.D. 220 (S.D.N.Y. 1970); Dombrovskis v. Murff, 24 F.R.D. 302 (S.D.N.Y. 1959); Russo v. Sofia Bros., Inc., 2 F.R.D. 80 (S.D.N.Y. 1959); Helene Curtis Industries, Inc., et ano. v. Sales Affiliates, Inc., 105 F. Supp. 886 (S.D.N.Y. 1952).

In fact, the district court must exercise its discretion to allow amendments freely. So. Suburban Safeway Lines, Inc. v. Concords, Inc., 256 F.2d 934 (2d Cir. 1958); Spampinato v. Breger & Co., Inc., 176 F. Supp. 149 (E.D.N.Y. 1958), aff'd 270 F.2d 46 (2d Cir. 1959); J. Moore, Federal Practice ¶ 15.08 at 895 (2 ed. 1974). Furthermore, the focus of the district court in determining whether to grant leave to amend to the moving party is on the prejudice caused to the opposing party and not on delay alone. Middle Atlantic Utilities Co. v. SMW Development Corp., 392 F.2d 380 (2d Cir. 1968); United States v. Spitzer, 261 F. Supp. 754 (S.D.N.Y. 1966); Public Administrator of N.Y. County, et ano. v. Curtiss Wright Corp., 224 F. Supp. 236 (1963); Eli-Fab, Inc. v. United States, 16 F.R.D. 553 (D. Rh. Is. 1954); Maschmecjer v. Ingram, et al., 97 F. Supp. 639 (S.D.N.Y. 1951); 3 J. Moore Federal Practice ¶ 15.08 at 901 (2 ed. 1974). If there is no prejudice caused to the opposing party, then the district court should not look to the sufficiency of the proposed

amendment as long as it appears not frivolous on its face. Glazer Steel Corp. v. Yawata Iron & Steel Co., Ltd., 56 F.R.D. 75 (S.D.N.Y. 1972); Key Pharmaceuticals, Inc. v. Hans Lowey, 54 F.R.D. 447 (S.D.N.Y. 1972); Dombrovskis v. Murff, 24 F.R.D. 302 (S.D.N.Y. 1959); Cravatts v. Klozo Fastener Corp., 16 F.R.D. 454 (S.D.N.Y. 1954), 3 J. Moore, Federal Practice ¶ 15.08 at 902-904 (2 ed. 1974).

The clearest cases for the granting of leave to amend are the correction and amplification of previously alleged claims. 3 J. Moore, Federal Practice ¶ 15.08 at 881 (2 ed. 1974). An amendment to show the court's jurisdiction should be allowed if there is any construction of the record that would indicate that jurisdiction does, in fact, exist. 28 U.S.C. § 1653; Fed. R. Civ. P. 15(a); Cox, et al. v. Livingston, 407 F.2d 392 (2d Cir. 1969); Citizens for Clean Air, Inc. v. Corps of Engineers, U.S. Army, 349 F. Supp. 696 (S.D.N.Y. 1972); Huggins v. White, 321 F. Supp. 732 (S.D.N.Y. 1970); Mazzella, et ano. v. Panoceania Shipping Corp. S.A., et ano., 232 F. Supp. 29 (S.D.N.Y. 1964); 3 J. Moore, Federal Practice ¶ 15.09 (2 ed. 1974). This is especially compelling when jurisdiction is sought to be shown through the addition of a technical statutory averment. United States v. Dauphin Steel and Engineering Co., Inc., 53 F.R.D. 382 (S.D.N.Y. 1971).

The plaintiff has alleged that the jurisdiction of this action is based on diversity of citizenship and the

Federal Tort Claims Act (FTCA). 28 U.S.C. §§ 1332 and 1346 (b).[2] Fed. R. Civ. P. 8(a)(1). Appendix at 71. The plaintiff applied to the district court for leave to file an amended complaint in greater particularity to show that the action is within the waiver of sovereign immunity embodied in the FTCA by alleging, inter alia, the plaintiff's compliance with 28 U.S.C. §§ 2401(b) and 2675(a).[3] Appendix at 81-90. 2A J. Moore, Federal Practice ¶ 8.17[2] at 1732 (2 ed. 1974).

The amendment should have been allowed by the district court to show that the action comes within the expanding concept of governmental liability under the FTCA. 2A J. Moore, Federal Practice ¶ 8.17[2] at 1737 (2 ed. 1974). Furthermore, there is statutory authority for the proposition that statutory exceptions to the general waiver of sovereign immunity from tort liability under the FTCA should be pleaded responsively as affirmative defenses. Builders Corp. of America v. United States, 259 F.2d 766 at 771 (9th Cir. 1958).

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[2] See brief of plaintiff-appellant at 9 for pertinent provisions of 28 U.S.C. § 1346(b).

[3] See brief of plaintiff-appellant at 20 for pertinent provisions of 28 U.S.C. §§ 2401(b) and 2675(a).

A. Whether the Plaintiff's Proposed Amended Complaint Is a Short Plain Statement of the Claim Showing that the Plaintiff Is Entitled to Relief?

The primary objectives of pleading under the Federal Rules of Civil Procedure are for the plaintiff to accord fair notice to the defendant of the general type of litigation involved so as to enable the defendant to answer and prepare for trial. 2A J. Moore, Federal Practice ¶ 8.03 at 1613 and ¶ 8.13 at 1695 (2 ed. 1974).

On appeal, the defendants make the bare assertion that the plaintiff's proposed amended complaint fails to state a claim. See brief of defendants-appellees at 11. This is notwithstanding the fact that the defendants answered the plaintiff's prior pleading with a particularity that showed full appreciation of the general type of litigation involved. Appendix 73-78.

If the defendants required more information to frame an answer to the plaintiff's claim, the defendants had recourse to a motion for a more definitive statement under Rule 12(e), discovery under Rules 26-35 and 45, a motion for summary judgment under Rule 56 or a pre-trial conference pursuant to Rule 16. In fact, a pre-trial conference had already been held in the matter. Appendix at 65. Further discovery and pre-trial proceedings were contemplated in the order of the district court dated December 6, 1973. Appendix at 65.

The plaintiff is permitted under the Federal Rules to plead statements of his claim alternately or hypothetically. Fed. R. Civ. P. 8(e). This permits the plaintiff to base his claim herein on a theory of tort liability with diversity jurisdiction and under the FTCA. The plaintiff is not required to elect between inconsistent theories. 2A J. Moore, Federal Practice ¶ 8.14 at 1718 (2 ed. 1974).[4]

The plaintiff's claim is sufficiently stated unless it appears to a certainty that the plaintiff would be entitled to no relief under any set of circumstances which could be proved in support of his claim. 2A J. Moore, Federal Practice ¶ 8.13 at 1706 (2 ed. 1974). The amended complaint is sufficient if within its framework evidence may be introduced which will sustain a grant of relief to the plaintiff. Under the standard of the Federal Rules, the plaintiff's claim is sufficiently stated. See Points III and IV in brief of plaintiff-appellant.

As set forth above, if there is no prejudice caused to the opposing party, then the district court should not look to the sufficiency of the proposed amendment as long as it

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[4] The defendants misstate their case when they indicate at page 18 in their brief that the plaintiff advanced, for the first time on appeal, the theory that whether the defendant doctors, Martin, Jasinski and Mansky were acting within the scope of their employment may determine which of the alternate bases for jurisdiction that the plaintiff proceeds upon. See paragraph 8 of affirmation of plaintiff's attorney in opposition to defendants' motion to dismiss where this theory was advanced by the plaintiff. Appendix at 100.

appears not frivolous on its face. Glazer Steel Corp. v. Yawata Iron & Steel Co., Ltd., 56 F.R.D. 76 (S.D.N.Y. 1972); Key Pharmaceuticals, Inc. v. Hans Lowey, 54 F.R.D. 447 (S.D.N.Y. 1972); Dombrovskis v. Murff, 24 F.R.D. 302 (S.D.N.Y. 1959); Cravatts v. Klozo Fastener Corp., 16 F.R.D. 454 (S.D.N.Y. 1954), 3 J. Moore, Federal Practice ¶ 15.08 at 902-904 (2 ed. 1974).

Furthermore, there is statutory authority for the proposition that statutory exceptions to the general waiver of sovereign immunity from tort liability under the FTCA should be pleaded responsively as affirmative defenses. Builders Corp. of America v. United States, 259 F.2d 766 at 771 (9th Cir. 1958).

The court in Builders Corp. of America reasoned that this allocation of the burden of pleading was in harmony with the spirit of the Federal Rules:

> "The spirit of the Rules is that technical requirements are abolished and that judgments be founded on facts and not on formalistic defects. Pretrial conferences have been authorized to carry out these objectives. Controlled discovery and proper admissions can expand the field of established fact." 259 F.2d at 771.

It is obvious on this appeal that further fact-finding by the district court is required in this matter to resolve the issues raised in the pleadings. It is a fiction to regard this matter as having been "adjudicated upon the merits." See Russo v. Sofia Bros. Inc., 2 F.R.D. 80 (S.D.N.Y. 1941). Yet, for the first time on appeal the defendants seek

to characterize the dismissal in the district court as a dismissal for the failure of the plaintiff to comply with the order of the court dated December 6, 1973. Appendix at 65. See Point I of brief of defendants-appellees. See Fed. R. Civ. P. 41(b). Since the defendants did not advance this position before the appeal, they should not be permitted to include it within the scope of the appeal.

Moreover, the plaintiff complied in substance with the order of the district court. The court ordered the plaintiff, inter alia, ". . . to file . . . an amended complaint containing a short, concise statement of the plaintiff's claim." Appendix at 66. As shown above, the amended complaint filed by the plaintiff and dated January 3, 1974 shows compliance in substance with the order of the court and Rule 8(a) of the Federal Rules of Civil Procedure.

In addition, the defendants should not be allowed to provide a foundation for the dismissal based on Rule 41(b) because the defendants cannot themselves have complied with the provisions of the order of the court dated December 6, 1973. The court expressly ordered that:

> "In the event that the directions of paragraphs 1, 2 and 3 are not complied with, an order of dismissal may be submitted on five (5) days notice of settlement." (emphasis supplied)

Appendix at 65. Cf. Fed. R. Civ. P. 58. No order of dismissal was ever submitted on notice by the parties. In the face of the defendants' failure to comply with the order,

it would be manifestly unfair to allow the defendants to characterize the dismissal as based upon the failure of the plaintiff to comply. The defendants are simply engaged on appeal in a search for a foundation upon which to base the dismissal by the district court when, in fact, there is no such foundation.

Even if the complaint submitted by the plaintiff can somehow be characterized as a failure to comply with an order of court, the district court should not have dismissed the action herein where any such noncompliance was neither willful nor in bad faith, and where such a dismissal denies to the plaintiff the fundamental due process right of an opportunity to be heard. Sepia Enterprises, Inc. v. City of Toledo, 462 F.2d 1315 (6th Cir. 1972); Fisher v. Frankel, 450 F.2d 950 (2d Cir. 1971); Council of Federated Organizations v. Mize, et ano., 339 F.2d 898 (5th Cir. 1971); 5 J. Moore, Federal Practice ¶ 41.12 at 1139 (2 ed. 1974).

Point II

WHETHER MEDICAL EXPERIMENTATION UPON FEDERAL PRISONERS SHOULD BE SUBJECT TO JUDICIAL REVIEW?

Otis Clay is a black male who was about fifty-one years of age when he participated in the medical experiment that is the subject of this action. At the time of the experiment Mr. Clay was a federal prisoner. The experiment involved the injection of the drug Naltrexone (EN 1693A) for the purpose of investigating the effect of the drug as a narcotic antagonist in man. In or about May of 1970 Mr. Clay received two injections of the drug from the defendant doctors which caused him to suffer a heart attack. Appendix at 71. Mr. Clay apparently signed a "consent form" to participate in the experiment. Appendix at 78.

Medical experiments that are conducted upon federal prisoners are fraught with the danger that the prisoner subjects have not given informed consent to participate in the experiment - J. Katz, Experimentation With Human Beings Ch. 13 (1972); Mulford, Experimentation on Human Beings, 20 Stan. L. Rev. 99. The circumstances of prison life serve to obviate the informed consent of the prisoner subjects, if not to preclude such consent altogether.

The provision of various privileges to prisoners once they "agree" to participate in the experiments renders involuntary any purported consent. This was undoubtedly the case with Mr. Clay. Prisoner subjects such as Mr. Clay are provided with better quality living conditions then

are enjoyed by the general prison population. Prisoner subjects "volunteer" to participate as a reaction against the intense boredom of prison life. Sometimes prisoner subjects are paid, or their sentences are shortened. They are given to understand that their participation may affect parole or job prospects. Often prisoner subjects make an impulsive decision to participate, with little or no actual consideration.

It is incumbent upon the courts to exercise judicial review for the purpose of imposing tort liability in order to fashion procedures and standards that ensure the quality of the informed consent of prisoner subjects and avoid the effective purchase of their consent. Williams, The Aims of the Law of Torts, 4 Current Legal Legal Problems 137. Important ethical considerations must be accounted for in the context of medical experimentation upon federal prisoners. The signing of a "consent form" such as was the case with Mr. Clay is a minimal formality with virtually no assurance that Mr. Clay is actually consenting to participate in the experiment.

However, the defendants assert that the judicial review of medical experimentation upon federal prisoners is effectively precluded by statutory and judicial immunity. See points III and IV in brief of plaintiff-appellant and point II and III in brief of defendants-appellees. This is in contrast to our heritage of judicial review:

> "The very essence of civil liberty certainly consists in the right of every individual to

> claim the protection of the laws, whenever he receives an injury." Marbury v. Madison, 1 Cranch 137 at 163 (1803)

Despite the enormous potential for abuse, medical experimentation on prisoners is customarily conducted in a cloak of governmental secrecy. L. Burger and M. Bundy, Secrecy and Medical Experimentation on Prisoners (Urban Information Interpreters Inc. 1974).

The policy considerations behind the principle of official immunity involve a balancing of interests between the use of tort liability to redress wrongs, and the effect that potential tort liability has on the effective administration of public affairs. See point III in brief of plaintiff-appellant. Experiments such as the experiment in which Mr. Clay participated are conducted for the benefit of society at large and not for the benefit of the individual prisoner subject. The further benefit to society derived from the protection of the individual federal prisoner who is subject to such medical experimentation outweighs the possibility of the deterrence of official action by the defendants herein. Cf. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388. Harlan concurring at 411 (1971) on remand 456 F.2d 1339 (2d Cir. 1972). This would be an especially compelling rationale as against the defendant doctors, Martin, Mansky and Jasinsky.

The plaintiff's claim against the defendants includes the intentional and negligent exposure of the plaintiff

to risk without the informed consent of the plaintiff. W. Prosser, Law of Torts, §§ 10 and 31 (4th ed. 1971). The complaint effectively alleges that the defendants Surgeon General, Attorney General, and director of the Bureau of Prisons knew or should have known that the plaintiff would be exposed to unreasonable risk while participating in the experiment conducted by the defendant doctors. Blitz v. Boog, 328 F. 2d 596 (1964).[5]

The defendants suggest for the first time on appeal that the district court lacked jurisdiction over the person of the defendant doctors, Martin, Jasinski and Mansky. See brief for defendants-appellees at 19. Since the defendants did not advance this position before the appeal, they should not be permitted to include it within the scope of the appeal. The defendants did not assert the defense of lack of jurisdiction over the person either by motion or in the answer.

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[5] Contrary to the defendants' assertion in their brief at 21, the plaintiff has stated a claim under FTCA against the defendant doctors in the nature of a technical assault and battery. See Lane v. United States, 225 F. Supp. 850 (E.D. Virginia 1963) Mulford, Experimentation on Human Beings, 20 Stan. L. Rev. 99. Section 233(e) of 42 USC provides:

> "For purposes of this section, the provisions of section 2680(h) of Title 28 shall not apply to assault or battery arising out of necligenct in the performance of medical, surgical, dental, or related function, in cluding the conduct of clinical studies or investigations."

The plaintiff's purported consent was rendered involuntary because of the circumstances under which it was obtained.

Fed. R. Civ. P. 12(b)(2). The defendants thereby waive the defense of lack of jurisdiction over the person. Fed. R. Civ. P. 12(h)(1). See Point II of brief for plaintiff-appellant.

In any event, the district court has acquired jurisdiction over the person of the defendant doctors. Fed. R. Civ. P. 4(e); N.Y. Civil Practice Law and Rules § 302(a) (McKinney 1972).

Rule 4(e) of the Federal Rules of Civil Procedure provides in relevant part that:

> ". . . Whenever a statute or rule of court of the or rule of court of the state in which the district court is held provides (1) for service of a summons . . . upon a party not an inhabitant of or found within the state . . . service . . . be made under the circumstances and in the manner prescribed in the statute or rule."

Section 302(a) of the New York Civil Practice Law and Rules provides in relevant part:

> "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:
>
> 1. transacts any business within the state; or
>
> 2. commits a tortious act within the state . . .; or
>
> 3. commits a tortious act without the state causing injury to person or property within the state . . . if he
>
> (i) regularly does or solicits business, or engages in any other persistent course of conduct . . . in the state . . ."

Throughout their brief the defendants-appellees allege that the defendant doctors were employees of the

Public Health Service at the time that the plaintiff's cause of action arose. See brief for defendants-appellees at 2, 6, 10, 12, 13, 14, 15, 17, 18, 19, 21, 22, 25. If the defendant doctors were employees of the Public Health Service at that time, then surely the Public Health Service satisfied the circumstances under which a court may exercise personal jurisdiction pursuant to Section 302(a) of the New York Civil Practice Law and Rules (CPLR). The Public Health Service transacts the business in New York from which the plaintiff's cause of action arose in that the Public Health Service has the authority to conduct , and undoubtedly conducts medical experimantation on prisoners in New York. See 42 U.S.C. chapters 1-6A[6].

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[6] Additionally, the defendant doctors committed the tortious act out of the State of New York chich caused the injury to the plaintiff and which, in turn, gave rise to the plaintiff's cause of action. The tortious act was the injection of Naltrexone (EN 1693A) into the plaintiff. The Public Health Service regularly does business and engages in a persistent course of conduct in New York.

The fact that the injury did not occur within the State of New York should not be a bar to the acquisition by the court of personal jurisdiction over the defendants pursuant to section 302(a)(3) of the CPLR where, as here, the person injured is a lifelong resident of New York who is a prisoner who has been placed into the custody of the Bureau of Prisons and who thereafter has been transported out of New York to another state where the tortious act is committed and the injury occurs. Otherwise, the administrative discretion of the Bureau of Prisons could be used to frustrate the judicial review of medical experimentation on residents of New York who are prisoners in the federal prison system. Cf. New York Civil Practice Law and Rules §§ 302(a)(2) and (3), (McKinney 1972).

Furthermore, the human medical experiment upon which this appeal is based was conducted by the defendant doctors and may well have been in the furtherance of the development of the drug Naltrexone (EN 1693A) by Endo Laboratories, Inc. which has the main office and a plant located in Garden City, New York. See articles appended to Defendants Further Answers to Interrogatories. Appendix at 39.

As appears above, the Public Health Service and the defendant doctors are involved in purposeful activity within New York which gives rise to sufficient "minimal contacts" between the forum and the defendants for the assertion of personal jurisdiction. N.Y. Civil Practice Law and Rules § 302(a) (McKinney 1972); Hanson v. Dencka, 357 U.S. 235 (1958); Klein v. Reynolds Co., Inc., 355 F. Supp. 886 (SDNY 1973).

The defendants have pressed their contention that 42 U.S.C. § 233(a) confers immunity in this action upon the defendant doctors Martin, Jasinski and Mansky. See plaintiff-appellant's brief at 10 and defendants-appellees' brief at 22. Section 233(a) can apply to the defendant doctors herein only if:

1. The plaintiff was injured as a result of the performance of medical or related functions, including the conduct of clinical studies of investigation,

2. The defendant doctors were employees of the Public Health Service when the injury occurred, and
3. The defendant doctors were acting within the scope of their office or employment when the injury occurred. See brief of plaintiff-appellant at 10 and 11 for the text of 42 U.S.C. § 233(a).

It does not appear from the record in the instant case whether the defendant doctors were employees of the Public Health Service, or whether they were acting within the scope of their office or employment when the injury to the plaintiff occurred. Accordingly, the cause should be remanded to the district court for further fact finding as to the issue of the nature and scope of the office or employment of the defendant doctors when the plaintiff's cause of action arose.

Furthermore, the plaintiff was injured when he sustained the heart attack on or about June 8, 1970 which was caused by the injection of Naltrexone (EN 1693A) in the course of a clinical study or investigation conducted by the defendant doctors. Section 233(a) of 42 U.S.C. was approved on December 31, 1970, more than six months after the plaintiff's cause of action arose. As shown in the brief of plaintiff-appellant at 12, exceptions to the broad waiver of governmental immunity embodied in the FTCA, such as Section 233(a), are to be narrowly construed.

Additionally, the presumption is that all laws operate prospectively only and against retroactivity absent

a clear expression of legislative intent. 2 Sutherland, Statutory Construction §§ 41.01-41.06 (4th ed. 1972). The plain meaning of the language of Section 233(a) shows that the legislature intended that the injury must occur in the performance of medical or related functions, including the conduct of clinical studies or investigation. Section 233(a) must be construed to apply only prospectively to such injuries that occur after the date of approval in order to avoid gross unfairness and a constitutionally suspect deprivation of due process to the plaintiff herein. Id. If Section 233(a) is construed to apply retroactively herein, this could effectively cause a forfeiture of a vested right of action against the defendant doctors which the plaintiff would otherwise possess. It is conceivable that the plaintiff would not have allowed himself to become a subject in this medical experiment if he had had notice that his right of redress via judicial review had been foreclosed by Section 233(a).

CONCLUSION

For the reasons stated above, the order of dismissal rendered by the district court should be vacated, the plaintiff should be allowed to amend his complaint in the district court, and the cause of the plaintiff should be remanded to the district court for further finding of fact.

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